No. 83-2102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE STATE OF TEXAS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF FOR THE ALABAMA PUBLIC SERVICE COMMISSION AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE SUPPORTING PETITION FOR CERTIORARI

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The Alabama Public Service Commission and the National Association of Regulatory Utility Commissioners hereby submit their joint brief as *amici curiae* in support of the petition for certiorari filed jointly by the State of Texas and the State of Kansas seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in *State of Texas v. United States,* 730 F.2d 339 (5th Cir. 1984) (attached as Appendix A to the Petition for Certiorari filed herein). Pursuant to Rule 36 of this Court, the written consents of counsel for the parties have been obtained and filed with the Court.

INTEREST OF AMICI

The Alabama Public Service Commission (APSC) is an administrative agency established under the Constitution and Laws of the State of Alabama. Among its duties, the APSC is statutorily required to regulate the intrastate rates and services of rail carriers operating within the State of Alabama. *Code of Alabama,* secs. 37-1-31 and 37-2-3 (1975). Under these statutory provisions, the APSC seeks to ensure that intrastate rail carriers operate in the public interest by providing common carrier transportation services at rates and charges which are just and reasonable.

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The APSC is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating rail operations within their respective borders. As such, these officials have the obligation to assure the establishment of intrastate rail services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The NARUC, in its capacity as the representative of the State regulatory commissions, participated before the Court of Appeals in this case as an Intervenor-Appellant.

The decision of the Court of Appeals for which petitioners seek review upheld, *inter alia,* the constitutionality

of section 214 of the Staggers Rail Act of 1980 (codified at 49 U.S.C. sec. 11501 (1983)). This statute radically transforms the systems by which the several State commissions, including the APSC, regulate intrastate rail rates and services in the public interest: section 214 requires that these agencies must either abandon their own long-standing regulatory regimes and agree to be completely controlled by the regulatory authority of the Interstate Commerce Commission, or cease rail regulation entirely. As such, the decision of the Court of Appeals upholding this unprecedented Federal intrusion into State regulatory affairs directly affects the APSC and each of the State members of the NARUC.

SUMMARY OF ARGUMENT

The issue presented the Court in this case which is of greatest concern to *amici* is whether the Tenth Amendment of the United States Constitution permits Congress to require that State regulatory comissions submit themselves to direct and complete regulation by the Interstate Commerce Commission (ICC) in order for these State agencies to exist as regulators of intrastate rail rates and services. In the decision below, the Court of Appeals held that the Tenth Amendment did not stand as an obstacle to the enactment of section 214 of the Staggers Rail Act of 1980 — the statute which requires the State commissions to submit to the ICC or abandon regulation — because this statute does not formally compel the State commissions to carry out Federal regulatory policy, and therefore, does not "regulate the States as States."

Amici APSC and NARUC submit that in reaching this conclusion, the Court of Appeals has erred. Under the legal standards articulated by the Supreme Court in *Na-*

tional League of Cities v. Usery, 426 U.S. 855 (1976) and its progeny, section 214 of the Staggers Act is unconstitutional by virtue of the constraints imposed on Congress' commerce powers by the Tenth Amendment. Viewed in its entirety, section 214 empowers and indeed directs the ICC to regulate the States as States; such regulation directly addresses an area that is an indisputable attribute of State sovereignty — the historic and long-settled authority of the States to regulate the intrastate rates and services of railroad monopolies in the public interest; and a State's compliance with section 214 directly impairs the State's ability to structure an integral governmental operation (the operations and priorities of a State regulatory commission) of a traditional governmental function — intrastate rail regulation.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT SECTION 214 OF THE STAGGERS ACT DOES NOT REGULATE THE STATES AS STATES

In its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the application of an Act of Congress to State governments and their agencies *can* constitute an unconstitutional intrusion upon the sovereignty of the States in violation of the Tenth Amendment.[1] *National League of Cities* and its progeny establish a three-part test to measure the constitutionality of Congressional enactments. A Federal statute violates the

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[1]The text of the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
> U.S. Const., Amdt. 10.

Tenth Amendment if the statute (1) regulates the "States as States"; (2) addresses matters that are "undoubted attributes of State sovereignty"; and (3) directly impairs a State's ability to "structure integral operations in areas of traditional governmental functions." See *Equal Employment Opportunity Commission v. Wyoming,* 460 U.S. ____, 75 L.Ed.2d 18, 29-30 (1983). Should the statute fail each of these tests, it still may pass constitutional muster, however, if it serves a Federal interest so compelling as to defeat a claim of State sovereignty. *Id.*

In its decision upholding section 214 of the Staggers Act, the Court of Appeals reached only the first prong of the *National League of Cities* formulation, holding that the statute does not regulate the States as States, and therefore, is constitutional. App. A to Pet. for Cert., at A-19, 730 F.2d at 353. The Court determined that because the States could abandon the field of intrastate rail regulation to the Interstate Commerce Commission (ICC or the Commission), section 214 does not compel the States to administer Federal regulatory policy, and therefore, cannot be said to regulate the States as States. *Id.*

As *amici,* the APSC and the NARUC urge this Court to grant the petition in order to decide this important question, i.e., whether an Act of Congress may completely and totally prescribe the decisionmaking and policymaking process by which the States regulate private commercial activity as long as these States may opt out of the Federal regulatory scheme by abandoning the field of regulation. Unlike previous decisions of this Court since its *National League of Cities* decision, this issue is squarely presented in this case, and as such deserves the Court's attention. We submit that by the enactment of section 214 of the Staggers Act, Congress has established a system of direct

regulation of the State regulatory commissions through the mechanism of ICC certifiction and review, and therefore, has regulated the "States as States."

A brief comparison of the ICC's authority over intrastate rail matters in the pre-Staggers Act regime with its authority under section 214 documents a fundamental shift in Congress' attention from the instrumentalities of intrastate commerce (the operations of the carriers within a given State) to the direct regulation of the State commissions. As codified at former section 11501 of Title 49, U.S.C. (West Supp. 1979), Congress under prior law delegated its so-called *Shreveport* authority to the ICC for the purpose of regulating intrastate rates which *affect interstate commerce.*[2] Under this delegation, the Commission was expressly empowered to prescribe intrastate rates "in order to cure undue discrimination against interstate commerce. . . ." *Carolina, C & O Ry. v. ICC,* 593 F.2d 1305, 1306 (D.C. Cir. 1979). Clearly, the focus of the

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[2]The Commission's jurisdiction over intrastate rates codified in prior section 11501 dates from this Court's 1914 decision in the *Shreveport Rate Cases, Houston, East & West Texas R. Co. v. United States,* 234 U.S. 342 (1914). In this decision, the Court held that the ICC had the implicit authority under the Interstate Commerce Act to establish intrastate rate levels in cases in which intrastate rates, although lawfully established by a State commission, discriminated against interstate commerce. Although at the time of the *Shreveport* decision Congress had not expressly granted the ICC any intrastate rate authority, the Court found that the Commission's authority to adjust intrastate rates was necessary to protect interstate commerce. In the Transportation Act of 1920 (41 Stat. 456), Congress codified the *Shreveport* holding by amending then section 13 of the Interstate Commerce Act (49 U.S.C. sec. 13) to explicitly provide that the ICC could establish an intrastate rate where a State-set rate was found to unreasonably interfere with interstate commerce. Such jurisdiction was limited, however, to the *Shreveport* principles; Congress did not give the Commission blanket authority over intrastate rate matters.

Commission's inquiry in pre-Staggers Act litigation under former section 11501 was a comparison between prevailing interstate rate or service levels with State decisions regarding similar intrastate matters. In these proceedings, the ICC assessed the effect of a State rate decision upon the relationship between similarly situated inter- and intrastate rail traffic. Only upon a finding that the State-established intrastate rates unreasonably discriminated against or unreasonably burdened (i.e., "affected") interstate commerce could the ICC adjust an intrastate rate to remove the burden or discrimination. However, the States were free to employ their own statutes, regulations, procedures and policies to arrive at intrastate rail decisions affecting interstate commerce.[3]

With the enactment of section 214, however, the Commission directed the Commission to shift its attention from a comparison of the inter- and intrastate rate or service levels to the decisionmaking process of the States. First, in section 214(a) of the Staggers Act, Congress revoked the Commission's *Shreveport* authority by amending 49 U.S.C. sec. 11501(a) (West Supp. 1983) to apply the unreasonable discrimination/burden analysis solely to State decisions involving freight forwarder service under subchapter IV of chapter 105 of Title 49, U.S.C. Then, Congress established in section 214(b) the requirement that State commissions must receive ICC certification of their respective "standards and procedures" or lose all intrastate rail jurisdiction. Furthermore, Congress established that to receive certification, State commissions

[3]As an example of the ICC decisions reviewing State rate decisions prior to the Staggers Act, see *West Virginia Intrastate Rates – Ex Parte No. 343,* 361 I.C.C. 51 (1979); *Montana Intrastate Freight Rates and Charges – 1977,* 357 I.C.C. 281 (1978); and *West Virginia Intrastate Rates and Charges,* 355 I.C.C. 823 (1977).

must submit for Commission approval regulatory standards and procedures which are "exclusively in accordance with the provisions of [the Interstate Commerce Act]." 49 U.S.C. sec. 11501(b)(1) (West Supp. 1983). Further, State standards and procedures not in accordance with Federal law would not be certified by the ICC.[4]

Although the State certification requirements contained in section 214 alone establish that Congress has chosen to regulate the States as States, the ICC review procedures codified at 49 U.S.C. sec. 11501(c)(West Supp. 1983) provide the ICC additional authority to directly control the State decisionmaking process. Under this section, the Commission is authorized to review a State rail decision not to assess its effect on interstate commerce, but rather to determine if "the standards and procedures applied by the State were not in accordance with the provisions of [Federal law]." By this language, (*which establishes the*

[4]The certification provisions of 49 U.S.C. sec. 11501(b) are quite specific. To be certified by the ICC, a State commission must submit to the Commission for its approval its "standards and procedures (including timing requirements)" within 120 days of the Staggers Act's effective date [sec. 11501(b)(2)]. The Commission must certify the State if the Commission determines that these standards and procedures are "in accordance" with the corresponding provisions of the Interstate Commerce Act [sec. 11501(b)(3)(A)]. Initial ICC certification is effective for five years from the date a State receives certification [sec. 11501(b)(5)(A)], and in addition, there are no provisions permitting the Commission to "decertify" a State once it grants certification. Only those State commissions receiving certification may exercise any jurisdiction over intrastate rail rates of any kind. [sec. 11501(b)(4)(B) and sec. 10501(b)]. After the initial five year period, a State must request subsequent five year certification under section 11501(b)(5)(A) by resubmitting its standards and procedures, or lose jurisdiction. Finally, during the five year certification period, a State commission may not change its previously certified standards and procedures without "express approval" from the ICC [sec. 11501(b)(5)(B)].

only grounds for ICC review in amended section 11501); Congress has clearly indicated that direct Federal regulation of the States is now the goal of Federal regulatory policy.

Viewed in their entirety, the provisions of section 214 do not provide for the regulation of interstate commerce; they do not provide for the regulation of intrastate commerce that affects interstate commerce; and they do not even provide for the regulation of commerce. They are not directed to the operation of instrumentalities of commerce or other activities in commerce. Instead, these provisions are directed at the State governmental functions of regulating intrastate rail transportation.

The Commission's implementation of the State certification procedures underscores the extensive Federal control of State regulatory policies and procedures established in section 214. On July 28, 1982, the Commission decided to tentatively certify the Illinois Commerce Commission to exercise intrastate rail jurisdiction in the State of Illinois. *State Intrastate Rail Rate Authority — P.L. 96-448,* Ex Parte No. 388, 365 I.C.C. 855 (1982).[5]

[5]Although section 11501(b) requires the ICC to issue final and permanent certification to petitioning State agencies within 120 days of the effective date of the Staggers Act, the ICC has had great difficulty in developing a workable certification program in its Ex Parte No. 388 proceeding. Initially, the ICC stated that the certification process would not be "a difficult one," requiring that the States merely submit information sufficient to enable the ICC to conclude "that the State authority *intends* to exercise jurisdiction consistent with the law." 45 Fed. Reg. 74571 (November 10, 1980) (emphasis supplied). Subsequently, the ICC rejected the filings of the States in response to the November 10, 1980 notice, and instead granted the States "provisional certification" pending the submission of additional information by the States. 46 Fed. Reg. 23335 (April 24, 1981). Following the submission of additional evidence of acceptable standards and procedures by the States in response to the April 24, 1981 notice, the ICC certified no

Attached as an Appendix to the Commission's July 28 decision in Ex Parte No. 388 is the revised application of the Illinois Commission which documents in vivid detail the pervasive regulation of the States as States established by section 214. In its 30-page application (*which on January 14, 1983 the ICC determined was not certifiable,* 367 I.C.C. 149 (1983)), the Illinois Commission adopted in detail the provisions of the Interstate Commerce Act. Included in the Illinois application is the explicit adoption of Federal standards and procedures for dealing with every aspect of intrastate rail regulation from such major issues as the granting of exemptions or procedures for the investigation and suspension of rates, to such minor issues as the procedures for tariff filing. Indeed, it is difficult to conceive of more complete and direct Federal regulation of the States as States than is represented by the Illinois application for certification.

In a recent construction of section 214, the United States Court of Appeals for the Seventh Circuit has held that the statute completely binds the States to direct con-

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petitioning States, extended "provisional certification," and required the submission of "updated" States standards and procedures. 47 Fed. Reg. 5786 (February 8, 1982). Following the resubmission of standards and procedures by the States, the ICC tentatively certified Illinois by the decision cited in the text. To date (46 months since the enactment of the Staggers Act), the vast majority of States have not been permanently certified. See ICC decision in Ex Parte No. 388 of January 14, 1983, 367 ICC 149 (1983). Of course, the State of Texas has been decertified ending its rail jurisdiction. See Appendix C to Pet. for Cert. One commentator has concluded that the ICC's problems are caused by a statutory scheme which is seriously flawed and fundamentally unworkable. McBride, *Interstate Commerce Commission Certification of State Regulatory Bodies and Review of Intrastate Rail Rate Decisions: The Need for Reform,* 51 ICC Prac. J. 476 (1984).

trol by the Federal Government. In *Illinois Central Gulf Railroad Co. v. ICC,* 702 F.2d 111 (7th Cir. 1983), the Court of Appeals held that section 214 "requires that consistent rulings of the ICC must necessarily be incorporated and adhered to by State commissions exercising jurisdiction pursuant to the Staggers Act." 702 F.2d at 115. In issuing its decision, the Seventh Circuit reversed a ruling of the ICC that the State commissions had been afforded some small measure of discretion by section 214 to establish State-specific policies concerning carrier demurrage practices. Finding no such discretion, the Court held that the States, if they are to regulate at all, are bound by not only the specific provisions of the Interstate Commerce Act (the Act), but also ICC interpretations of the Act. More complete regulation of the State commissions is hard to imagine.[6]

In this regard, it is useful to compare the direct regulation of the States as States by section 214 with the system of Federal regulation established in the Public Utility Regulatory Policies Act of 1978 (PURPA), Public Law No. 95-617, 92 Stat. 3117 (1978), which was upheld against a Tenth Amendment challenge in *FERC v. Mississippi,* 456 U.S. 742 (1982). In this case (which is perhaps the case most analogous to the proceeding at bar in the *National League of Cities* line of decisions), the Court upheld provisions of PURPA which required State implementation of Federal regulations (section 210) and State consideration of the adoption of Federal policies concerning the regulation of gas and electric utilities (Titles I and III). Unlike section 214 of the Staggers Act, which the ICC and the courts have determined requires the explicit State

[6]See also, *State of Texas v. United States,* 730 F.2d 409 (5th Cir. 1984); and *Wheeling Pittsburgh Steel Corp. v. ICC,* 723 F.2d 346 (3rd Cir. 1983).

adoption of every aspect of Federal law, PURPA was found to be only mildly intrusive upon State prerogatives. For example, the Court determined that a State commission can satisfy the requirements of section 210 of PURPA "simply by opening its doors to claimants." 456 U.S. at 760. Similarly, the Court noted that Titles I and III of PURPA "require only *consideration* of federal standards." 456 U.S. at 764. By contrast, section 214 of the Staggers Act requires a State to completely abandon its own system of regulation in favor of the total acceptance of Federal control of its system of rail regulation. The NARUC submits that with regard to the first prong of the *National League of Cities* test (Federal regulation of States as States) the degree of Federal intrusiveness is crucial. As the Court affirmed in *Mississippi,* Congress enacted PURPA to merely supplement State regulation in furtherance of Federal energy policy. By the Staggers Act, however, Congress has commandeered the mechanisms of State government through direct regulation of the States.

In addition to relying on this Court's decision in *Mississippi,* the Court of Appeals placed strong reliance on *Hodel v. Virginia Mining Association,* 452 U.S. 264 (1981) and *Hodel v. Indiana,* 452 U.S. 314 (1981) for the proposition that section 214 of the Staggers Act does not regulate the States as States, and therefore, is permissible under the *National League of Cities* analysis. The statute under consideration in the *Hodel* cases, the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. sec. 1201 *et seq.* (the Mining Act), does resemble section 214 of the Staggers Act in certain respects. Both statutes contain preemptive provisions which preserve a role for State regulation, and in so doing, both confront a State with the stark choice of submitting to the will of Congress or aban-

doning regulation. Cf. *Hodel,* 452 U.S. at 288-290 and 49 U.S.C. sec. 11501 (West Supp. 1983). Although similar, the Mining Act upheld in *Hodel* (as analyzed by the Court) is distinguishable from section 214 of the Staggers Act.

In *Hodel,* the Mining Act "prescribe[d] federal *minimum standards* governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program." 452 U.S. at 289 (emphasis supplied). The Court found that the imposition of such minimum standards enabled the States "to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* A State, in responding to its particular needs, could exceed Federal minimum standards, by enacting and enforcing tighter regulatory standards against private mine owners, which differed from Federal minimum requirements.

Under the Staggers Act, the States enjoy no such flexibility to structure their regulatory programs "to meet their own particular needs." Section 214 permits no deviation from Federal "standards and procedures." 49 U.S.C. sec. 11501(b) (West Supp. 1983). Rather, the provisions of the Interstate Commerce Act as amended by the Staggers Act establish both minimum and maximum standards available to the States to regulate intrastate rail carriers. Whereas the Mining Act permits an aggressive State the flexibility to enact stringent regulations to protect its citizens from environmental degradation, the Staggers Act flatly prohibits a State regulatory program which provides greater protection than Congess has seen fit to provide.

Clearly, then, section 214 of the Staggers Act regulates the policies and procedures of the States much more intrusively than does the Mining Act. As noted *supra,* under the Court's opinion in *Mississippi*, the degree of Federal in-

trusiveness is crucial in determining whether the statute under review "regulates the States as States." The regulatory statute reviewed by the Court therein (PURPA) and the Mining Act reviewed in *Hodel* both preserved substantial State discretion to tailor individual State regulatory programs to meet local needs and conditions. By removing any State discretion to respond to State and local concerns, section 214 intrudes far beyond PURPA or the Mining Act, resulting in direct Federal regulation of the States as States. Therefore, the decision of the Court of Appeals is in error, and should be reversed by this Court.

CONCLUSION

It is perhaps ironic that the Court of Appeals rejected arguments that section 214 denies the States a republican form of government on the ground that this argument is "illimitable." App. A to Pet. for Cert. at A-28, 730 F.2d at 358. By upholding a statute as coercive and intrusive as section 214 of the Staggers Act, the Court has in effect determined that there is no constitutional limit to the power of Congress to intrude upon the policies, practices and procedures of State government, as long as the States can abandon the field. We submit that such a conclusion does grave violence to the structure of American constitutional government, and therefore, we respectfully urge this Court to grant the petition for certiorari and reverse the judgment below.

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